**SEET CHUAN SENG & ANOR.**

**v.**

**TEE YIH JIA FOOD MANUFACTURING PTE. LTD.**

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK GUNN
CHIT TUAN CJ (MALAYA),
TAN SRI DATO' MOHD EUSOFF
BIN CHIN SCJ,
DATUK WIRA WAN YAHYA
BIN PAWAN TEH SCJ
[CIVIL APPEAL NO. 02-561-92]
19 MAY 1994

***TRADEMARKS: Passing-off - Whether established - Necessary elements - Trading in similar product - Whether the trade name and get-up of product distinctly referable to the plaintiff - Damages - Whether to be proved - Products in direct competition with one another - Whether damages suffered by plaintiff to be inferred.***

***INTERPRETATION: Agreement stipulated that no restraint of trade or competition imposed on defendants - Whether defendants could not be restrained from unfair competition - Interpretation - The "good commercial sense" principle - Whether applicable.***

The first appellant and the respondent herein had started a popiah skin business in Singapore under the name "Tee Yih Jia Po Piah Dried Pastry Factory (Pte) Ltd" and subsequently became successful manufacturers and sellers of the said product, which they packed in various sizes of wrappers carrying a logo similar to the swastika symbol. The first appellant later left the business in Singapore and formed the second appellant,"Tee Yih Jia Po Piah Dried Pastry Factory (M) Sdn Bhd" in Malaysia, and started to carry on similar business using the same trade name, logo and get-up. The facts showed that on 30 September 1980 the first appellant sold off his entire shares in the respondent and in the agreement executed therefor, it was stipulated, *inter alia*, by clause 5 therein, that " there shall be no restraint of trade or restraint of competition whatsoever imposed upon the vendor..... and that the vendor is at liberty to engage , trade or be interested in any form of business whatsoever whether touching on the manufacturing or dealing of Po Piah Dried Pastry or otherwise".

The respondent applied for an injunction to restrain the appellants from continuing with the trade on the ground of passing-off, which the learned High Court Judge granted on like ground. The appellants appealed and argued that the learned Judge had erred as, although there was representation by their use of the package, get-up and logo and name Tee Yih Jia (TYJ), that representation did not amount to such misrepresentation necessary for a successful action in passing-off and secondly, that even if all the elements of passing-off had been made out, passing-off by the appellants was allowed by clause 5 of the aforesaid agreement.

**Held:**
**Per Gunn Chit Tuan CJ (Malaya), Wan Yahya Bin Pawan Teh SCJ**

**[1]** The trial Judge was correct in his finding of fact that to a potential buyer of popiah skins, discerning or otherwise, the use by the appellants of the name TYJ accompanied by the relevant logo and get-up not dissimilar to the respondent's products, did tend to confuse, with the result that the appellants' products could easily be passed off as that of the respondent's. And so too his finding that the name TYJ, logo and get-up had become distinctive of the respondent's products and the use by the appellants was certainly likely to deceive and cause deception.

**[2]** In an action for passing-off it is necessary for the plaintiff to establish that he has suffered damage. However, if the goods in question, as in this case, are in direct competition with one another, the Court will readily infer the likelihood of damage to the plaintiff's goodwill through loss of sales and loss of the exclusive use of his name. Be that as it may, on the facts of this case, in view of the similarity in name, logo and get-up and type of product dealt with by both parties, there is a likelihood of diversion of customers from the respondent to the appellants which would result in the loss to the respondent.

**[3]** In considering the tort of passing off the terms "unfair competition" or "unfair trading" ought to be given due consideration. The reference in clause 5 to the term "competition" can only give the impression "fair competition in businesses" and therefore when the parties herein entered into the said agreement what they had in mind was that there should be no restraint of fair competition. It would be wrong to equate unfair competition to the word "competition" used in clause 5 of the agreement and

contend that the appellants were therefore allowed to pass-off their trade or goods as that for the respondent by using the various badges of the respondent in trade including the get-up, TYJ name and swastika logo.

**[4]** In construing this agreement, made between two businessmen, there must be ascribed to the words used therein a meaning that would make good commercial sense. In the circumstances, the rule of interpretation described by Lord Diplock in *Miramar Maritime Corp. v. Holborn Oil Trading Ltd.* [1984] AC 676 as "the good commercial sense principle" ought to apply, thereby enabling this Court to assert that no businessman, who had not taken leave of his senses, would intentionally enter into an agreement which exposed him to unfair trading and the kind which is actionable in a passing-off action. It follows that the contractual word "competition" used in clause 5 of the agreement, therefore, should not and cannot be manipulated to say that the appellants cannot be restrained from unfair competition.

**Per Mohd Eusoff Bin Chin SCJ**

**[1]** With respect, I am unable to agree with the view that the words " there shall be no restraint of competition whatsoever imposed on the vendor" in clause 5 of the agreement should be read to mean "there shall be no restraint of fair competition whatsoever imposed on the vendor". Firstly, with the insertion of the word "fair", the word "whatsoever" will become redundant and meaningless. Secondly, the law allows fair competition and no one commits tort of passing off if it based on fair competition. It is thus unnecessary to insert the clause "there shall be no restraint of fair competition" because the law already takes care of that. The parties therefore must have intended what they agreed in that clause.

**[2]** On proper construction of clause 5, the first appellant cannot be restrained from using the words "Tee Yih Jia" or using the logo and get-up complained of. Clause 5 is worded in plain and clear language and it contains no ambiguity or uncertainty and the Court should not read into this clause something else which is not there. By interpreting clause 5 to mean that unfair competition is to be excluded, or only fair competition is to be allowed, the Court is in fact inserting new terms into the agreement. It is not the function of the Court to make a contract for the contracting parties and nor is it the function of the Court to improve the contract which the parties have negotiated and made for themselves however desirable the improvement might be.

*[Appeal dismissed on majority decision].*

**[Bahasa Malaysia** Translation of Headnote]

***CAP DAGANGAN: Kelirupa - Sama ada terbukti - Unsur-unsur yang perlu - Berdagang barangan yang serupa - Sama ada nama cap dagangan dan penyediaan barangan boleh dibezakan dengan jelasnya daripada barangan plaintif - Gantirugi - Sama ada perlu dibuktikan - Barangan bersaing antara satu sama lain - Sama ada kerugian yang dialami oleh plaintif boleh disimpulkan.***

***PENTAFSIRAN: Perjanjian menetapkan bahawa tiada halangan atau saingan dikenakan ke atas defendan - Sama ada defendan tidak boleh dihalang daripada saingan yang tidak adil - Pentafsiran - Prinsip "firasat komersial yang baik" - Sama ada terpakai.***

Perayu pertama dan responden dalam tindakan ini telah memulakan sebuah perniagaan kulit popiah di Singapura di bawah nama "Tee Yih Jia Po Piah Dried Pastry Factory (Pte) Ltd" dan kemudiannya menjadi pengeluar dan penjual yang berjaya dalam barangan tersebut, di mana ianya dibungkus dalam pelbagai saiz pembalut yang mengandungi logo yang serupa dengan simbol swastika. Perayu pertama kemudiannya meninggalkan perniagaan tersebut di Singapura dan menubuhkan perayu kedua, "Tee Yih Jia Po Piah Dried Pastry Factory (M) Sdn. Bhd" di Malaysia, dan mula menjalankan perniagaan yang serupa menggunakan nama cap dagangan, logo dan penyediaan yang sama. Fakta-fakta menunjukkan bahawa pada 30 September 1980 perayu pertama menjual kesemua sahamnya dalam responden dan dalam perjanjian yang ditandatangani, adalah dinyatakan antara lain, oleh klausa 5 di dalamnya itu, bahawa "tiada apa jua halangan dagangan atau halangan saingan dikenakan ke atas penjual ... dan bahawa penjual bebas untuk menggunakan khidmat, berdagang atau berminat dalam mana-mana bentuk perniagaan sama ada berhubung dengan pengeluaran atau urusniaga Po Piah Dried Pastry atau sebaliknya".

Responden telah memohon untuk suatu injunksi bagi menghalang perayu daripada meneruskan dengan dagangan tersebut atas alasan kelirupa,

di mana Hakim yang bijaksana tersebut telah benarkan atas alasan tersebut. Perayu membuat rayuan dan menghujahkan bahawa Hakim yang bijaksana tersebut telah tersilap memandangkan, walaupun wujudnya representasi dari segi penggunaan pembalut, penyediaan dan nama Tee Yih Jia (TYJ), representasi tersebut tidak terjumlah kepada salahnyataan yang perlu untuk berjaya dalam tindakan kelirupa dan keduanya, bahawa jika sekalipun segala unsur kelirupa dibuktikan, kelirupa oleh perayu adalah dibenarkan oleh klausa 5 perjanjian yang tersebut di atas.

**Diputuskan:**
**Per Gunn Chit Tuan HB (Malaya), Wan Yahya Bin Pawan Teh HMA**

**[1]** Hakim perbicaraan tersebut adalah betul dalam kedapatan beliau bahawa kepada bakal pembeli kulit popiah, yang berhati-hati atau sebaliknya, penggunaan nama TYJ oleh perayu yang diiringi dengan logo dan penyediaannya yang serupa dengan barangan responden, bermaksud untuk mengelirukan, yang mana akan mengakibatkan barangan perayu dengan mudahnya dapat dikelirupa sebagai barangan responden. Dan begitulah juga dengan kedapatan beliau bahawa nama TYJ, logo dan penyediaannya sudah sebati dengan barangan responden dan penggunaan oleh perayu akan memperdaya dan menyebabkan perdayaan.

**[2]** Dalam tindakan kelirupa, adalah perlu untuk plaintif membuktikan yang dia telah menanggung kerugian. Walau bagaimanapun, jika barangan yang dipersoalkan itu, sebagaimana dalam kes ini, adalah bersaing secara langsung antara satu sama lain, Mahkamah akan membuat kesimpulan gantirugi ke atas nama baik plaintif melalui kehilangan jualan dan kehilangan kegunaan khusus namanya. Jika begitu, berdasarkan kepada fakta-fakta kes ini, melihat kepada keserupaan dalam nama, logo dan penyediaan dan jenis barangan yang diniagakan oleh kedua-dua pihak, maka akan terdapat kecenderungan perubahan pelanggan-pelanggan dari responden kepada perayu yang mana akan membawa kerugian kepada responden.

**[3]** Dalam menimbangkan tort kelirupa terma "saingan yang tidak adil" atau "dagangan yang tidak adil" haruslah diberikan pertimbangan yang sewajarnya. Terma "saingan dalam klausa 5 hanya boleh memberikan gambaran "saingan adil dalam perniagaan" dan oleh yang demikian apabila pihak-pihak dalam tindakan ini menandatangani perjanjian tersebut, apa yang berada dalam fikiran mereka adalah bahawa tidak harus ada sebarang halangan terhadap saingan yang adil. Adalah salah untuk menyamakan saingan yang tidak adil kepada perkataan "saingan" yang digunakan dalam klausa 5 perjanjian tersebut dan menghujahkan bahawa perayu adalah dengan itu dibenarkan untuk mengelirupa dagangan atau barangan mereka sebagai barangan responden dengan menggunakan pelbagai tanda responden dalam dagangan termasuklah penyediaan, nama TYJ dan logo swastika.

**[4]** Dalam mentafsirkan perjanjian ini, yang dibuat di antara dua ahli perniagaan, perkataan-perkataanya hendaklah diberikan maksud yang akan membuat firasat komersial yang baik. Dalam hal ini, kaedah pentafsiran yang disebutkan oleh Lord Diplock dalam kes *Miramar Maritime Corp. v. Holborn Oil Trading Ltd*. [1984] AC 676 sebagai "prinsip firasat komersial yang baik" haruslah terpakai dan dengan itu membolehkan Mahkamah mengesahkan bahawa tiada mana-mana ahli perniagaan, yang menpunyai firasat, akan dengan sengaja menandatangani sesuatu perjanjian yang akan mendedahkannya kepada dagangan yang tidak adil dan yang mana boleh dibawa tindakan dan kes kelirupa. Maka perkataan kontraktual "saingan" yang digunakan dalam klausa 5 perjanjian tersebut tidak seharusnya dan tidak boleh diperalatkan untuk menyatakan bahawa perayu tidak boleh dihalang daripada saingan yang tidak adil.

**Per Mohd Eusoff Bin Chin HMA**

**[1]** Dengan hormat, saya tidak bersetuju dengan pandangan bahawa perkataan "tiada apa jua halangan saingan dikenakan ke atas penjual" di dalam klausa 5 perjanjian tersebut harus dibaca sebagai bermaksud "tiada apa jua halangan saingan yang adil dikenakan ke atas penjual". Pertama, dengan dimaktubkan perkataan "adil", perkataan "apa jua" menjadi lebihan dan tidak bererti lagi. Kedua, undang-undang mengizinkan saingan yang adil dan tiada siapa pun melakukan tort kelirupa jika didasarkan kepada persaingan yang adil. Dengan itu adalah tidak perlu untuk memaktubkan klausa " "tiada apa jua halangan saingan yang adil" oleh kerana perkara tersebut sudah diurus oleh undang-undang. Kerana itu,

kedua-dua pihak adalah memaksudkan apa yang mereka persetujui di dalam klausa tersebut.

**[2]** Atas tafsiran wajar klausa 5, perayu pertama tidak boleh dihalang dari menggunakan perkataan "Tee Yih Jia" atau menggunakan logo dan penyediaan yang dipersoalkan. Klausa 5 telah digubal dengan bahasa yang terang dan jelas dan tidak mengandungi apa-apa kesamaran atau ketidakpastian dan tidaklah wajar bagi Mahkamah membaca dari klausa ini sesuatu yang tidak ada di dalamnya. Dengan mentafsir klausa 5 sebagai bermaksud untuk mengenepikan persaingan yang tidak adil, atau sebagai membenarkan hanya persaingan yang adil, Mahkamah sebenarnya memasukkan terma baru kedalam klausa tersebut. Bukanlah tugas Mahkamah membuat kontrak bagi pihak-pihak yang berkontrak dan bukan juga tugas Mahkamah untuk memperbaikki kontrak-kontrak yang dibuat dan dirundingkan sendiri oleh mereka walaupun perbaikan kepada kontrak itu amat diperlukan.

*[Rayuan ditolak atas keputusan majoriti].*

**Cases referred to:**
*Pakai Industries Bhd. v. Chen Yew Industries Sdn. Bhd. [1991] 2 CLJ 1574* ***(refd)***
*Erven Warninck v. Townsend & Sons (Hull) Ltd. [1979] AC 731; [1979] 2 All ER 927; [1989] RPC 31 (HL)* ***(foll)***
*Trollope & Colls v. NW Hospital Board [1973] 2 AER 260* ***(not foll)***
*Moorgate Tobacco Ltd. v. Philip Morris Ltd. [1984] 156 CLR 414* ***(refd)***
*Yew Wan Leong v. Lai Kok Chye [1990] 2 MLJ 152* ***(refd)***
*Lee Ah Chor v. Southern Bank Bhd. [1991] 1 MLJ 428* ***(refd)***
*John Dickinson v. Apsley Press [1937] 54 RPC 219* ***(refd)***
*May v. May [1943] IRPC 324* ***(refd)***
*Spalding v. Gamage 84 L J Ch. 449* ***(refd)***
*Miramar Maritime Corpn. v. Holborn Oil Trading Ltd. [1984] AC 676; [1984] 2 AER 326 (HL)* ***(foll)***
*Antaios Cia Naviera SA v. Salen AB [1985] AC 191; [1984] All ER 229* ***(foll)***

**Legislation referred to:**
Contracts Act 1950, s. 24

**Other sources referred to:**
**Law of Trade Marks and Trade Names,** Kerly's, 12th Edn., p. 185
**The Law of Passing-off,** Christopher Wadlow

*For the appellants - Low Hop Bing (F.H. De Cruz & Low Kin Kong with him); M/s. Low & Lee*
*For the respondent - V.L. Kandan (Linda Wang with him); Shearn & Delamore*

## JUDGMENT

**Gunn Chit Tuan CJ (Malaya):**
This was an appeal against the decision of the learned High Court Judge, Dato' Haji Abdul Malek bin Haji Ahmad, given on 17 December 1992, after trial of the action in Kuala Lumpur High Court Civil Suit No. C1305 of 1985. The learned Judge had found, *inter alia*, that there was passing-off by the appellants of their trade or business and/or popiah skins as and for that of the respondent by the use of:

(i) the trade name "Tee Yih Jia" whether in Roman or Chinese characters;
(ii) a package get-up identical to or closely resembling the respondent's package get-up;
(iii) the "swastika" logo appearing at the bottom lefthand corner of the get-up.

*The facts as found by the learned High Court Judge*

One Goi Seng Hui, the Chairman and Managing Director of the respondent, and Seet Chuan Seng, the first appellant, had with a few others, launched the popiah (spring roll) skin business on 14 October 1969 in Singapore under the name "Tee Yih Jia Po Piah Dried Pastry Factory (Pte) Ltd." and had successfully carried on business as manufacturers and sellers of popiah skins packed in various sizes of polythene wrappers. It was not disputed that their success was attributed to the fact that the popiah skins, square in shape, were for the first time made by machine and their unsurpassed durability had resulted in their overwhelming popularity. There was also no disagreement as to the fact that the first appellant had left and rejoined the respondent but had later started a limited company in the form of the second appellant in Malaysia.

The bone of contention between the parties was the trade name "Tee Yih Jia" (hereinafter "TYJ") which translated from Chinese means "the first house", "the first one", "first grade", "foremost" or "pioneer". Both parties had given evidence in the High Court that each of them had decided on the name first and had designed the relevant logo similar to the swastika symbol or four square popiah skins placed together, and had done the relevant get-up.

*The Issue*

Although a number of issues were raised at the trial, there was according to the learned Judge, and we agreed with him, that there was only one issue, namely whether the first appellant by forming the second appellant in Malaysia and carrying on a similar business using the same name "TYJ", logo and get-up, passing-off has been established by the respondent to warrant the Court granting the prayers asked for, namely an injunction to restrain the appellants from continuing the alleged acts of passing-off, and orders that the second appellant do forthwith apply to the Registrar of Companies to have its corporate name amended by the removal of the words "TYJ" therefrom, for delivery up of all the offending goods, full discovery of all relevant documents, obliteration of all offending marks followed by due verification upon oath, an inquiry for assessment of damages for breach of contract, confidence and passing-off, costs and such further and other relief as the Court may deem just. We also agreed with the learned Judge that the whole case in this suit also hinged upon the agreement made between the said Goi Seng Hui and the first appellant on 30 September 1980 and it is therefore necessary to set out hereunder in full the agreement minus its Schedule A:

> This Agreement is made 30 September One Thousand Nine Hundred and Eighty (1980) between Seet Chuan Seng of No. 8R, Block E, Amber Tower, Amber Road, Singapore (hereinafter called "the Vendor") of the one part and Goi Seng Hui of No. 34, Farrer Road, Singapore, (hereinafter called "the Purchaser") of the other part.
>
> *Whereas:*
>
> 1. The vendor is the registered proprietor of 1,250 fully paidup shares in the undertaking known as Tee Yih Jia Po Piah Dried Pastry (Private) Limited, a company incorporated in Singapore and having its registered office at No. 14, Little Road, Singapore, (hereinafter called "the Company") of which the vendor is the Managing Director and the purchaser the Chairman.
> 2. The parties herein have agreed that the vendor shall sell and the purchaser shall purchase all the vendor's said shares in the company upon the terms hereinafter set out.
>
> *Now It Is Hereby Agreed And Declared as follows:*
>
> 1. The vendor shall sell and the purchaser shall purchase all the said 1,250 shares in Tee Yih Jia Po Piah Dried Pastry Factory (Private) Limited presently held by the vendor. The sale price shall be at Singapore Dollars Eight Hundred per share (S$800) and the total consideration shall be Singapore Dollars One Million (S$1,000,000).
> 2. Immediately upon signing of this agreement, the purchaser shall pay to the vendor's solicitors Messrs Tan, Kong & Co. as stakeholders, the sum of Singapore Dollars Five Hundred Thousand (S$500,000) representing one-half of the purchase price.
> 3. Completion of the sale and purchase of the said shares shall take place at the office of Messrs Tan, Kong & Co. on 29 December 1980 or earlier at purchaser's option. Time is of essence in this agreement.
> 4. On the date of completion, the full balance of S$500,000 shall be paid by the purchaser by way of a cashier's order drawn in favour of the vendor against delivery to the purchaser or his solicitor of a deed of transfer duly executed by the vendor in favour of the purchaser in respect of the whole of the said shares accompanied by the share certificates relating thereto together with resignations of the vendor and his wife Tan Ah Yip from the board of the company. Should the purchaser fail to complete as aforesaid, the sum paid pursuant to clause (2) above shall be forfeited to the vendor.
> 5. There shall be no restraint of trade or restraint of competition whatsoever imposed upon the vendor by virtue of the sale and purchase herein and the parties herein expressly agree that the vendor is at absolute liberty to engage, trade or be interested in any form of business whatsoever whether touching on the manufacturing or dealing of Po Piah Dried Pastry or otherwise.
> 6. All trade debts of the Company comprised in Schedule A annexed hereto shall be settled by the Company by payment to Messrs Wee Swee Teow & Co. on their undertaking to pay to the creditors comprised in Schedule A annexed hereto on the date of completion.
> 7. The purchaser shall indemnify the vendor in respect of any liability arising out of any guarantee which the vendor shall already have executed to facilitate obtaining for the Company loan and overdraft facilities.
> 8. The vendor and the purchaser shall act as Joint Managing Directors during the said period of three (3) months or thereabout prior to the conclusion of the sale and purchase and shall co-operate in the management of the Company and carry out duties and functions reasonably expected of them provided that these duties shall not extend to giving any personal guarantee of any kind.

9. The parties herein agree to cause the appointment of the purchaser as Joint Managing Director as soon as payment by the purchaser pursuant to clause (2) has been received and cleared. Documents requiring the signature of the Managing Director shall be signed jointly by both vendor and purchaser during this said interim period pending completion.
10. The sale of shares is strictly to the purchaser directly and this agreement and the rights therein shall not be assignable to the purchaser's nominee prior to completion thereof.
11. The vendor hereby warrants that to the best of his knowledge the only existing substantial unsettled purchase Contracts made by him on behalf of the Company, apart from those disclosed in Schedule A are as follows:

| | | |
|---|---|---|
| i. | Wing Engineering (Pte) Ltd. | $ 5,000.00 |
| ii. | Kah Motor Co. Sdn. Bhd. | $28,394.00 |
| iii. | Lim Co Book Manufacture | $12,375.00 |
| | | $45,769.00 |

12. This agreement shall be construed and take effect according to the Laws of the Republic of Singapore.

In Witness Whereof the parties have hereunder set their hands and seals the day and year first above written.

Signed Sealed and Delivered )
by Seet Chuan Seng in the )
presence of: )

Richard Kong
Advocate & Solicitor
Singapore

Signed Sealed and Delivered )
by Goi Seng Hui in the )
presence of: )

Huang Lui
Advocate & Solicitor
Singapore

*Submissions of both parties*

Mr Low Hop Bing, senior Counsel for the appellants, cited *Pakai Industries Bhd. v. Chen Yew Industries Sdn. Bhd.* [1991] 2 CLJ 1574 in which case Dato' Dr. Zakaria b. M. Yatim, J. had referred to *Erven Warninck v. Townsend & Sons (Hull) Ltd.* [1979] AC 731; [1979] 2 All ER 927; [1989] RPC 31 (HL)

In that case Lord Diplock pointed out that it is possible to identify the following five characteristics which must be present in order to create a valid cause of action for passing-off:

(1) a misrepresentation,
(2) made by a trader in the course of trade,
(3) to prospective customers of his or ultimate consumers of goods or services supplied by him,
(4) which is calculated to injure the business or goodwill of another trader, (in the sense that this is a reasonably forseeable consequence),
(5) which causes actual damage to a business or goodwill by whom the action is brought.

Counsel for the appellants submitted that characteristics (1) to (3) above referred to the trading activities of a trader, whilst characteristics (4) and (5) referred to the issues of competition where one trader has set up in competition with another trader. It was contended by the appellants that the learned trial Judge had erred in that although there was representation by the appellants by their use of the package, get-up and logo and TYJ name, that representation did not amount to such misrepresentation necessary for a successful action in passing-off. Alternatively it was further contended that even if all the elements of passing-off have been made out, passing-off by the appellants was allowed by clause 5 of the above-quoted agreement.

On misrepresentation, learned Counsel for the appellants contended that the respondent was not using the get-up shown in the statement of claim. It was stated that that was the get-up used by the respondent in 1984 and that at the time of the issue of the writ it was not, so the appellants claimed, being passed off. It was strongly argued for the appellants that the respondent had therefore abandoned and had no exclusive rights to the get-up as shown in its statement of claim.

Next it was contended for the appellants that the respondent could not claim exclusive rights to the name TYJ as those words, meaning "First House" in Chinese are words which are commonly used and moreover those words have been in use since the Tang Dynasty. In Roman alphabet the name TYJ has no specific meaning. It is simply a name. It was not disputed that in Chinese those words mean "First House" or "First One.

As regards clause 5 of the agreement dated 30 September 1980 it was the submission of

Counsel for the appellants that even if the elements of passing-off have been established against them, such passing-off would be permissible and not actionable by the respondent as clause 5 of the said agreement allowed for such acts by the appellants. On the main dispute as to the meaning and interpretation of the words "no restraint of competition whatsoever" learned Counsel for the appellants cited *Trollope & Colls v. NW Hospital Board* [1973] 2 AER 260 and contended that in interpreting clause 5 the phrase "no restraint of competition whatsoever' must be given the wide meaning which the words imply, namely, allowing any form of competition whatsoever with the respondent, including the right to use and trade under the same name TYJ, the swastika logo and to use the package get-up referred to in the statement of claim.

Counsel for the appellants then referred to the Law of Passing-off by Christoper Wadlow at page 23 thereof where the following portion of the judgment of Deane J. in *Moorgate Tobacco Ltd. V. Philip Morris Ltd.* [1984] 156 CLR 414 was reproduced:

> The phrase "unfair competition" has been used in the judgments and learned writings in at least three distinct ways, namely:
>
> (i) as a synonym of the doctrine of passing-off;
> (ii) as a generic name to cover the wide range of legal and equitable causes of action available to protect a trader against the unlawful trading activities of a competitor; and
> (iii) to describe what is claimed to be a new and general cause of action which protects a trader against damage caused either by "unfair competition' generally or more particularly, by the "misappropriation" of knowledge or information in which he has a quasi-proprietary right.

Learned Counsel for the appellants then sought to equate the reference to "competition" in clause 5 to passing-off or synonymous therewith, and on construing clause 5 in that sense, he contended that it would read that there shall be no restraint of trade or passing-off imposed upon the first appellant. In effect it was the submission of the Counsel for the appellants that "competition whatsoever" in clause 5 is wide enough to include both fair and unfair competition and thus the appellants are allowed to pass-off as against the respondent.

As regards the contention of the appellants that the respondent had no exclusive rights to or had abandoned the get-up set out in the statement of claim, reference was made by Dato' Kandan, the senior Counsel for the respondent, to Kerly's **Law of Trade Marks and Trade Names** (12th Edn.) at p. 185:

> ...The adoption of a new trade mark for goods previously sold under an old mark may be evidence of the abandonment of the old one. But the fact of itself is not conclusive; it is no justification for the defendant to say, "The plaintiff has two ways of identifying his goods, and I have only stolen one of them." Many businesses nowadays keep a "stockpile' of marks, ready registered for eventual use; and marks whose use is discontinued for one line of goods may well be returned to stock ...

Thus it was contended by the respondent that the adoption of a new mark by the respondent may be evidence of abandonment but that fact by itself is not conclusive. It was also repeatedly stressed by Counsel that although the package get-up was upgraded several times, two features remained consistent and were present in all the respondent's package get-up used, namely, the name TYJ, in both Chinese and Roman characters, and the swastika logo. It was contended that there could not therefore have been abandonment of such features of the package get-up by the respondent. In any case it was pointed out that the abandonment by the respondent or the respondent's loss of exclusive rights to the get-up shown in the statement of claim by reason of its use of other package get-up were non-issues at the proceedings before the High Court as these matters were never mentioned by the appellants in their pleadings. Counsel pointed out where a vital issue was not raised in the pleadings it could not be allowed to be argued to succeed on appeal. Dato' Kandan also pointed out that no attempts were made by the appellants to have their amended statement of defence further amended. On this point he relied on the Supreme Court cases of *Yew Wan Leong v. Lai Kok Chye* [1990] 2 MLJ 152 and *Lee Ah Chor v. Southern Bank Bhd.* [1991] 1 MLJ 428.

Counsel for the respondent then pointed out that it was found by the learned trial Judge that through evidence of use and association established at the trial, the name TYJ, whether in Roman alphabet or in Chinese characters, had become distinctive and referable exclusively to the respondent in relation to popiah skins. He

pointed out that a business may lawfully adopt and operate under any name which is unappropriated for businesses of the same kind, and when the name has become identifiable with the business by repute, it is as well entitled to protection for that name as for its own. Reference was made by Counsel to *John Dickinson v. Apsley Press* [1937] 54 RPC 219 where the plaintiffs were carrying on business at Apsley Mills and were known as 'Apsley". It was held by the chancery division that the plaintiffs were entitled to protect the name for its own, even though "Apsley" was also commonly used in reference to the place itself.

It was also pointed out by Counsel that by the time the second appellant was incorporated on 24 January 1981, the respondent had just effected a change of name (in November 1980) from "Tee Yih Jia Po Piah Dried Pastry Factory Pte. Ltd." to "Tee Yih Jia Food Manufacturing Pte. Ltd". However, it was only the descriptive part of the respondent's name of "Po Piah Dried Pastry Factory" that was altered to become "Food Manufacturing Pte. Ltd." The distinctive part of the respondent's name, Tee Yih Jia, was retained and continued to be used at all times and it was contended that the use of the name TYJ by the appellants was calculated to lead the trade and the public to the belief that the second appellant is an agency, branch or somehow associated with the respondent. It was contended that there was therefore a misrepresentation for which the respondent was entitled to reliefs as against the appellants for passing-off.

As regards the second part of the appellants' arguments that even if the elements of passing-off have been established against the appellants, such passing-off is permissible and not actionable as clause 5 of the agreement dated 30 September 1980 allows such acts by the appellants, Counsel for the respondent contended that the passage from Christopher Wadlow's book on **The Law of Passing-off** quoted above referred to "unfair competition" and not merely "competition". Fair competition in trade is allowed and legitimate. Unfair competition, however, is actionable and Counsel contended that it was improper to equate the meaning attributed to "unfair competition" as that for "competition" and say that clause 5 of the agreement allowed the appellants to pass-off their trade and/or goods as that for the respondent by using the various badges of the respondent in trade including the get-up Tee Yih Jia name and swastika logo. Counsel then submitted that the whole basis for an action based on passing-off is so that the public would not be deceived or misled as to the make, origin or type of goods which they are buying and to allow a trader to seek protection against damage to its reputation and goodwill by reason of unfair competition. Counsel pointed out that if clause 5 was read in such manner as would allow for passing-off, the Court would in effect be allowing deception to be practised on the public as to the source or origin of the goods and urged the Court not to accept the interpretation as correct as proposed by the appellants.

It was also the contention of Dato' Kandan that if clause 5 of the agreement was interpreted as contended by learned Counsel for the appellants to allow passing-off, then that would bring the agreement within s. 24 of the Contracts Act which would render the agreement void. Section 24 of the Contracts Act 1950 provides as follows:

> 24. The consideration or object of an agreement is lawful, unless -
>
> (a) it is forbidden by a law;
> (b) it is of such a nature that, if permitted, it would defeat any law;
> (c) it is fraudulent;
> (d) it involves or implies injury to the person or property of another; or
> (e) the Court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

It was argued that if the agreement is void and it is accepted that the acts of the appellants amounted to misrepresentation and passing-off, then the finding of the learned trial Judge should be confirmed and upheld. It was therefore the contention of the respondent that the interpretation to be given to clause 5 of the agreement as canvassed for the appellants should not be accepted as it would in effect make the agreement one which allows the commission of a tort (passing-off) otherwise unlawful and contrary to public policy.

Counsel for the respondent also cited *May v. May* [1943] IRPC 324 as authority for the principle that the vendor of a business must do nothing after the sale which is calculated to suggest that he is still carrying on the old

business or to be associated therewith. Counsel also pointed out that there was no agreement for the sale of the goodwill for the respondent company to the appellants, whether in the business or that relating to the TYJ name or logo. He pointed out that they only vested in the respondent and in the absence of express agreement the appellants do not get a "blank cheque" to trade under the same name as the respondent or to use the logo or any of the respondent's get-up or trade mark at will.

*Passing-off*

The principle of law regarding passing-off has been plainly stated by Lord Parker in *Spalding v. Gamage* 84 LJ Ch. 449 "and that is, that nobody has any right to represent his goods as the goods of somebody else". It is therefore wrong for a trader to conduct his business as to lead to the belief that his goods or business are the business of another. For an authority on passing-off, we could do no better than to quote the words of Lord Diplock in the leading speech in *Erven Warnink v. Townend & Sons (Hull) Ltd*:

> My Lords, *A.G. Spalding & Bros. v. A.W. Gamage Ltd.*, 84 LJ Ch. 449 and the later cases make it possible to identify five characteristics which must be present in order to create a valid cause of action for passing off:
>
> (1) a misrepresentation
> (2) made by a trader in the course of trade,
> (3) to prospective customers of his or ultimate consumers of goods or services supplied by him,
> (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and
> (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so.

We would also refer to and quote the following test proposed by Lord Fraser in the same case:

> It is essential for the plaintiff in a passing off action to show at least the following facts:
>
> (1) that his business consists of, or includes, selling in England a class of goods to which the particular trade name applies;
> (2) that the class of goods is clearly defined, and that in the minds of the public, or a section of the public, in England, the trade name distinguishes that class from other similar goods;
> (3) that because of the reputation of the goods, there is goodwill attached to the name;
> (4) that he, the plaintiff, as a member of the class of those who sell the goods, is the owner of goodwill in England which is of substantial value;
> (5) that he has suffered, or is really likely to suffer, substantial damage to his property in the goodwill by reason of the defendants selling goods which are falsely described by the trade name to which the goodwill is attached.

In this case it was admitted that there was representation by the appellants by their use of the package, get-up and logo and TYJ name but that the representation did not amount to such misrepresentation necessary for a successful action in passing-off. Whether a representation, express or implied, is a misrepresentation is a question of fact and we agreed with the learned Judge in his finding of fact that to a potential buyer or customer of popiah skins, discerning or otherwise, the use by the appellants of the name TYJ accompanied by the relevant logo and get-up not dissimilar and almost resembling the respondent's products did certainly tend to confuse and the resultant effect would be that the appellants' products could easily be passed off as that of the respondent's. Like the learned Judge we were also satisfied from the evidence that the name TYJ, logo and get-up had become distinctive of the respondent's products and the use by the appellants was certainly likely to deceive or cause deception. It was not disputed that the appellants were selling popiah skins in this country. It was a fact that there is a likelihood of diversion of customers from the respondent to the appellants which would result in loss to the respondent in view of the similarity in name, logo and get-up and type of product dealt with by both parties.

In an action for passing-off, damage is also an essential element of the tort and it is necessary for the plaintiff to establish that he has suffered damage. However, if the goods in question, as in this case, are in direct competition with one another, the Court will readily infer the likelihood of damage to the plaintiff's goodwill through loss of sales and loss of the exclusive use of his name.

As we were also satisfied on the facts of this case that passing-off had been established by the respondent, we would confirm the judgment of the learned Judge made on 17 December 1992.

*Construction of clause 5 of the Agreement*

Finally as regards the second part of the appellants' contention that even if the elements of passing-off have been established against the appellants, such passing-off is permissible under clause 5 of the said agreement, like the learned Judge, we were also satisfied after perusal of the appeal records that passing-off had been established against the appellants. When we consider the tort of passing-off we should have in mind the terms "unfair competition" or "unfair trading". Any one reading the agreement and the reference in clause 5 to the term "competition" would, in our view, have had in his mind fair competition in businesses. Christopher Wadlow in his book on **The Law of Passing-off** pointed out that Lord Diplock in *Erven Warninck's* case had related passing-off to a wider concept of unfair trading. He said:

> Unfair trading as a wrong actionable at the suit of other traders who thereby suffer loss of business or goodwill may take a variety of forms, to some of which separate labels have become attached in English law. Conspiracy to injure a person in his trade or business is one, slander of goods another, but the most protean is that which is generally and nowadays, perhaps misleadingly, described as passing-off. The forms that unfair trading takes will alter with the ways in which trade is carried on and business reputation and goodwill acquired.

Therefore when the parties entered into the said agreement they had in mind that there should be no restraint of fair competition. It would have been superfluous to have referred to unfair competition which is in any case actionable and we agreed with the learned Counsel for the respondent that one could not equate unfair competition to the expression "competition" used in clause 5 of the agreement and contend that the appellants were therefore allowed to pass-off their trade or goods as that for the respondent by using the various badges of the respondent in trade including the get-up, TYJ name and swastika logo.

Moreover, in construing this agreement made between two traders or businessmen, we would be inclined to use a rule of interpretation described as "the good commercial sense principle" as formulated by Lord Diplock in *Miramar Maritime Corpn. v. Holborn Oil Trading Ltd.* [1984] AC 676; [1984] 2 AER 326 (HL). In that case a bill of lading contained a clause providing that "all the terms whatsoever" of the charter under which the shipment was carried "except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in this shipment". One of the terms of the charter required a charterer to pay demurrage. The owners of the vessel tried to recover the demurrage from the consignees of the cargo, as holders of the bill of lading, on the basis that the demurrage clause in the charter had been incorporated into the bill of lading, but with the implied substitution of references to a consignee under a bill of lading in respect of the cargo for references to the charterer. Lord Diplock drew attention to the extent of the liability which a consignee might incur if it were held that the demurrage clause in the charter had been incorporated into the bill of lading. His Lordship said:

> There must be ascribed to the words a meaning that would make good commercial sense if the Exxonvoy bill of lading were issued in any of these situations, and not some meaning that imposed upon a transferee to whom the bill of lading for goods afloat was negotiated, a financial liability of unknown extent that no business man in his senses would be willing to incur ... My Lords, I venture to assert that no businessman who had not taken leave of his senses would intentionally enter into a contract which exposed him to a potential liability of this kind; and this, in itself, I find to be an overwhelming reason for not indulging in verbal manipulation of the actual contractual words used in the charterparty so as to give to them this effect when they are treated as incorporated in the bill of lading.

In this case we would also assert that no businessman, who had not taken leave of his senses, would intentionally enter into an agreement which exposed him to unfair trading and the kind which is actionable in a passing-off action. We would also adopt the same reasoning to say that we should not manipulate the contractual word "competition" used in clause 5 to say that the appellants cannot be restrained from unfair competition. We would also quote and adopt the following words of Lord Diplock in yet another recent case of *Antaios Cia Naviera SA v. Salen AB* [1985] AC 191; [1984] All ER 229:

> ... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.

*Decision*

Therefore, for the reasons stated above, we, by a majority of two to one (with Tan Sri Dato' Mohd. Eusoff b. Chin SCJ, dissenting), decided that the appeal should be dismissed with costs here and below.

**Mohd Eusoff Bin Chin SCJ:**
The learned trial Judge had correctly held when he said in his judgment:

> In my view, the whole case hinges upon the agreement made between Goi Seng Hui (PW1) and the first defendant on 30 September 1980 (hereinafter referred to as "the relevant agreement) and to get its full impact, it is appropriate and necessary to see it out in full in its original form minus its Schedule A:

and he set out the agreement. He went on to say in his judgment:

> Of particular importance is clause 5 which forms the basis of the suit before me. My interpretation of it is that the first defendant is not prohibited from carrying on the business of manufacturing or dealing in popiah skins but he is certainly not entitled to use the name TYJ, logo and get up especially so after the plaintiffs had acquired a substantial reputation and goodwill in respect of the said name, logo and get up in this region.

But the learned Judge, upon examining all the authorities cited by the parties to him, concluded that "it is trite law that each case would certainly depend on the facts of each particular case." He however, did not set out in detail the full facts leading to the signing of the agreement dated 30 September 1980. I now set out the facts as found in the record of appeal before us.

Before 1965 the first defendant (Seet Chuan Seng) was a mechanic repairing machinery.

In 1965 the first defendant was running a provision shop called Cheng Thye. He gave up this business and started popiah skin business with three other persons, one of whom was Chng Kay Chuan, PW4. The popiah skins then were made manually or by hand. In 1966 the factory started to use machine to make the popiah skins. According to the first defendant he alone designed the machine; that he bought the metals and sent them to the foundary to make the machine. This is not difficult to believe since as a mechanic, he was quite familiar with the workings of machines. He claimed that his 3 partners were sleeping partners because they were concentrating on their own other businesses, i.e. two were running sundry shops and one running a transport business.

In 1966 too, the name of the factory was changed to Tee Yih Jia Popiah Factory. The word "Tee Yih Jia" in Chinese means "the first one" or "pioneer". The first defendant said the name was appropriate as his factory was the first one to use machine to make popiah skins.

In 1967 the partnership was increased to 11 persons, including Tay Ah Seng (PW2). In 1969 the name of the factory was again changed to Tee Yih Jia Dried Pastry Factory Pte. Ltd., with 25 shareholders. Up to that time, Goi Seng Hui (PW1) was not involved in this factory.

It was in 1977 that Goi Seng Hui (PW1) bought the shares from the 25 shareholders. At first, the first defendant refused to sell his shares as the factory was making profits, but he was persuaded by PW1 to sell his shares to him (PW1) on the promise that he would be made a director and managing director of the company. The first defendant sold his share to PW1 on 11 July 1977, and on 18 November 1977 he was made the managing director and a director of the company. In April 1979, PW1 gave 50% of the shares in the company back to the first defendant, and PW1 and the first defendant became the only shareholders of the company.

Differences and misunderstanding arose between PW1 and the first defendant. PW1 when giving evidence for the respondent, said that the first defendant was trying to control the company. PW1 further said that the first defendant was in charge of management and marketing while he (PW1) was the Chairman of the company. But the first defendant refused to accept PW1's views and opinions. In any event, owing to the differences, they could not get along well. The company was then worth about S$4 million, and was making good profits. Both PW1 and the first defendant went many times to consult their accountant, Hee Lee Seng (PW3) who advised them to forget their differences, and to concentrate on their business. As time passed, it was evident that both PW1 and the first defendant could not get on well with each other. PW3 advised them that one of them should buy out the other. They agreed. They had a final meeting at PW3's office on 7 July 1980, and it was agreed that PW1 should buy the first

defendant's shares in the company. They worked out the terms of the sale and purchase agreement. Both PW1 and the first defendant engaged solicitors to help them to settle the terms of the agreement. Two and a half months later on 30 September 1980, PW1 and the first defendant signed the agreement, witnessed by their solicitors.

The first defendant said that in 1966, after inventing the machine, he "had invented the words 'Tee Yih Jia'" because that was the first time a factory ever made popia skins by using machine instead of manually.

PW1 claimed that he invented and designed the logo and pictures on the popia wrapper, but did not explain to the Court how or where he got the idea. The first defendant, too, claimed he was the person who designed the logo and pictures on the popiah wrapper. But the first defendant explained in detail how or where he got the idea in 1969. He said in evidence that the logo which looked like the German swastika was in fact a sign normally found in the vegetarian hall of a Chinese Buddhist temple. It is a sign of smoothness. He had chosen this sign as the logo because initially his customers were mainly from the Chinese temples. Further, the popiah skin did not contain any meat as it was made from flour, salt, oil and water.

As regards the pictures or get-up on the popiah wrapper, he had designed it by arranging popiahs and vegetables on a square popiah skin, as depicted on the wrapper, and then took photographs of the arrangements.

Under the circumstances it is most probable that the first draft was the inventor of the logo, the get-up and the name 'Tee Yih Jia'.

As the inventor of the logo and the design appearing on the popiah wrapper, and the inventor of words 'Tee Yih Jia' for the company, he was not prepared to part with them when he sold his 50% shares in the company to PW1. He said in evidence that he had agreed to sell his 50% shares to PW1 only if he could keep his right to the name (Tee Yih Jia), the logo and the get-up on the popiah wrapper. The company was then in Singapore. His intention after selling his 50% shares to PW1, was to open a company in Malaysia and to continue making popiah skins.

The evidence shows that after he sold his 50% shares to PW1, the first defendant came to Malaysia, and continued to manufacture popiah skins and naming his company Tee Yih Jia Popiah Dried Pastry Factory (M) Sdn. Bhd., and continued to use the logo and wrapper he had invented.

With these facts in mind, I will now look into the terms of clause 5 of the agreement dated 30 September 1980, and which agreement had been concluded only after lengthy negotiations of about two and a half months culminating in the first defendant's agreeing to sell his 50% shares to PW1. It must also be borne in mind that both parties to the agreement consulted and engaged solicitors to vett and finalise the agreement.

Clause 5 of the agreement states:

> There shall be no restraint of trade or restraint of competition **whatsoever** imposed upon the vendor by virtue of the sale and purchase herein and the parties herein expressly agree that the vendor is at absolute liberty to engage, trade or be interested in any form of business whatsoever whether touching on the manufacturing or dealing of Po Piah Dried Pastry or otherwise.
> [emphasis added]

By the first part of this clause 5, the parties had agreed that:

(i) there shall be no restraint of trade **whatsoever;** and
(ii) there shall be no restraint of competition **whatsoever;**

imposed on the vendor (who is the first defendant) by virtue of the sale and purchase agreement herein.

The learned Chief Justice and my learned colleague Wan Yahya SCJ when dismissing this appeal were of the view that the words "There shall be no restraint of competition whatsoever imposed on the vendor" in clause 5 of the agreement should be read to mean "there shall be no restraint of **fair** competition whatsoever imposed on the vendor". With regret, I am unable to agree with their views. Firstly, with the insertion of the word 'fair', the word 'whatsoever' will become redundant and meaningless. Secondly, the law allows fair competition and no one commits tort of passing off if it is based on fair competition. The law only prohibits unfair competition, such as using other people's trade names for his goods. In other words, it is unnecessary to insert the clause "there shall be no

restraint of **fair** competition" because the law already takes care of that. The parties therefore must have intended what they agreed in clause 5, and the Court should not interfere with this agreement.

The situation here is completely different from the cases cited, as supported by the peculiar facts of this case leading to the formulation of the terms and conditions agreed upon by the parties. After consulting their accountant and accepting the accountant's advice that one should buy out the other, both PW1 and the first defendant consulted their own solicitors. It took them two and a half months to negotiate, to vett and to agree on the terms and conditions of the sale of the 50% shares owned by the first defendant to PW1. This shows that the agreement was not done in a hurry and drafting mistakes must be ruled out.

If, therefore, the parties had intended that there should be restraint of unfair competition to be imposed on the first defendant, surely the solicitors would have so worded clause 5 of the agreement as to reflect the true intention of the parties. But PW1 had chosen not to impose on the vendor (first defendant) any restraint of competition whatsoever. The word 'whatsoever' cannot be ignored by the Court when construing or interpreting this clause 5 because it qualifies the 'competition'. It shows clearly that the intention of PW1 (the purchaser) was not to impose on the first defendant (the vendor) any restraint of competition, be it fair or unfair competition. It is not difficult to see why this is so. The facts evidently shows that the bitter relationship between PW1 and the first defendant had come to the stage where PW1 could no longer tolerate the presence of the first defendant. PW1 therefore, admitted in evidence that he was ready to sell his share or to buy first defendant's share in the company. But from the facts, one thing was certain. Both of them could not exist in the same company.

The evidence also shows that the first defendant was reluctant to leave the company. So he asked for an exorbitant price for his shares. PW1 in his evidence confirmed that the price was exorbitant, but he nevertheless agreed to it. It is not difficult to deduce from the facts that PW1's state of mind then was such that he was prepared to concede to the demand made by the first defendant so long as he could rid himself of the first defendant who, on the other hand, was willing to leave the company and set up a new company in Malaysia on the condition that he be allowed to retain his rights to the use of the name "Tee Yih Jia", the use of the temple logo and the get-up on the popiah wrapper all of which he had claimed to belong to him because he had either devised, designed or invented them.

So, it was on those terms that the first defendant had agreed to sell his share to PW1 and leave the company. Clause 5 of the agreement dated 30 September 1980 therefore, was drawn up and agreed to by both parties to reflect their true intention. It is worded in plain and clear language. It contains no ambiguity or uncertainty. The Court should not read into this clause 5 something else which is not there. By interpreting clause 5 to mean that unfair competition is to be excluded, or only fair competition is to be allowed, the Court is in fact, inserting new terms into the agreement. It is not the function of the Court to make contract for the contracting parties. It is also not the function of the Court to improve the contract which the parties have negotiated and made for themselves however desirable the improvement might be. *In Trollope & Colls Ltd. v. North West Meteropolitan Regional Hospital Board,* 1973, 2 All, 260 the House of Lords held that an unexpressed term could only be implied if the Court found that the parties must have intended that term to form part of their contract. Lord Pearson in that case said, at page 268:

> The Court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, **there is no choice** to be made between different possible meanings: **the clear terms must be applied** even if the Court thinks some other terms would have been more suitable. An unexpressed term can be implied if **and only if** the Court finds that the parties must have intended that term to form part of their contract: it is not enough for the Court to find that such a term would have been adopted buy the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficiency to the contract, a term which, although tacit, formed part of contract which the parties for themselves.

For the reasons given, I would construe clause 5 of the agreement dated 30 September 1980 to mean what it clearly says, i.e. that the first

defendant who had formed the second defendant (company) cannot be restrained from using the words "Tee Yih Jia" or using the Logo and get up complained of, since PW1 who became the sole owner of the plaintiff, had by the agreement, expressly given his consent for their use.

I would, therefore, allow this appeal with costs.

**YEONG AH CHEE @ YAN HON WAH**

**v.**

**LEE CHONG HAI & ANOR. AND 13 OTHER APPEALS**

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HARUN BIN MAHMUD HASHIM SCJ,
DATO' PEH SWEE CHIN SCJ,
TAN SRI DATO' MOHD EUSOFF BIN CHIN SCJ
[CIVIL APPEAL NOS: (I) 02-485-91; (II) 02-488-91; (III) 02-490-91; (IV) 02-491-91; (V) 02-494-91; (VI) 02-496-91; (VII) 02-498-91; (VIII) 02-486-91; (IX) 02-487-91; (X) 02-489-91; (XI) 02-492-91; (XII) 02-493-91; (XIII) 02-495-91 & (XIV) 02-497-91]
3 JUNE 1994

***TRUSTS: Vendors entering into agreement for sale of land - Vendors subsequently making trust deeds holding land as trustees for beneficiaries - Land transferred to purchasers - Beneficiaries suing surviving trustee and purchasers for return of the land - Whether there was a valid trust created - Whether there was a completely constituted trust - Beneficiaries not providing consideration for creation of the trusts - Beneficiaries mere volunteers - Whether equity can come to the aid of the beneficiaries.***

In these 14 appeals, which were heard together, the respondents are three beneficiaries under seven trust deeds dated 17 June 1970 who sought declarations, retransfers of the land and damages for fraudulent breach of trust against the trustees.

The appellants, the purchasers of the land and/or their nominees and assigns and the surviving trustee, contended that they were the purchasers of the land or that they had acquired them *bona fide* for valuable consideration from the original purchasers of the land which in any event was before the date of the trust deeds. In the premises the appellants contended that the trust deeds were void.

The learned Judge at first instance held that the appellants knew that the land was trust property and that as the land was transferred without an order of the Court, the transfers were void constituting a fraud within the meaning of s. 340(2) of the National Land Code 1965. The appellants appealed against the decision of the High Court allowing the respondents prayers.